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Supreme Court of the United States

March Term, 1945

No. 1083

MURRAY COHEN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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MURRAY COHEN,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Murray Cohen, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit (#248 February Term 1945) entered on March 12th, 1945.

History of Case

This case arose in the United States District Court, Southern District of New York, where Petitioner was indicted on the 15th day of February, 1944.

The indictment contained one count and charged the defendant Cohen and one John Francis Leonard with the crime of conspiracy to violate the provisions of the Selective Training and Service Act (Title 50, Sec. 311 United States Code Annotated). This case was tried before Hon.

John W. Holland, District Judge and a Jury. Petitioner was found guilty and was sentenced on September 28, 1944 to a term of imprisonment of three years and fined the sum of $500, bail was granted in the sum of $2500 pending appeal.

On appeal to the United States Circuit Court for the Second Circuit the Judgment of conviction was affirmed. A *Per Curiam* opinion was written by the Circuit Court in this case.

Summary Statement of the Matter Involved

The indictment charged the Petitioner and one John Francis Leonard with the crime of conspiracy to violate the provisions of the Selective Service and Training Act (U. S. C. A. 311, Record on Appeal, pages 5, 6 and 7), to wit; "to knowingly make and be a party to the making of a false statement as to the physical unfitness and non-liability of Murray Cohen, Petitioner herein for service under the provisions of the Selective Service Training Act and Rules, Regulations and Directions made pursuant hereto."

The indictment contains further language showing the alleged method adopted by the defendants in carrying out their conspiracy and specifically mentions the making of a false statement as to the physical unfitness of Murray Cohen, the Petitioner, in that he was therein falsely represented as having a hernia and entitled to a classification of 4F on account of such physical ailment (pp. 5, 6 and 7).

John Francis Leonard the person indicted with the Petitioner was a member of the Local Draft Board #20 where Petitioner registered.

The Government upon the trial proved the making of the false statement as to the physical unfitness and non-liability of Petitioner through the testimony of the said John Francis Leonard who having pleaded guilty to the indictment, testified on behalf of the Government and admitted that he was the one who made the false statement in the record as to the physical unfitness of Murray Cohen (p. 84). Said Leonard testified that he used the form of another person who had been found to have had a hernia by the medical examiners and said that he erased the name of such other person and inserted the name of Petitioner in place thereof all of which he did at the Local Draft Board in the presence of one Wilson a co-member of the Draft Board on or about May 20, 1943. Murray Cohen, your Petitioner was not present at the time such false statement was made in his physical record (pp. 84-131).

Your Petitioner took the stand in his own defense and denied that he had ever conspired with either Leonard or Wilson to do this unlawful act and never knew that it had been done or was going to be done until he was informed of such fact by the agents of the Federal Bureau of Investigation—in the month of December, 1943, some seven months after its commission (pp. 184-187, 221).

The trial of the case hinged mostly on the contention made by your Petitioner that he first learned of the alteration in his physical record from the mouths of the members of the Federal Bureau of Investigation in the month of December, 1943 seven months after his said record had been altered as hereinabove mentioned.

The Government called in rebuttal the two members of the Federal Bureau of Investigation who had examined

Petitioner on December 6, 1943 (pp. 275, *et seq.* and pp. 306, *et seq.*). These agents testified that they made written notes of all questions propounded to and answers given by your Petitioner on December 6, 1943 (pp. 285, 290, 301 and 314). They both stated that they had examined their notes on the day of trial in preparation for their testimony (pp. 285-291, 314). Both these witnesses testified as refreshed from their notes as to each question and answer made upon said examination of Petitioner on December 6, 1943. Their testimony was tantamount to a statement obtained from Petitioner. They both denied that they had informed Petitioner that he was 4F on account of a hernia. They both stated that the word "hernia" was not mentioned during the course of the examination. They likewise stated that the words "hay fever" or "sinus" was not mentioned during the course of said examination of the Petitioner. Such testimony given by these members of the Federal Bureau of Investigation was in direct conflict with the testimony of your Petitioner who had preceded them on the witness stand at the trial. Petitioner had, as the record shows, claimed he suffered from hay fever and sinus (Exhibit "A"). This claim was on file with Petitioner's Draft Board.

Upon the cross-examination of the members of the Federal Bureau of Investigation called as Government witnesses, a request was made by Petitioner's counsel for the production of the written notes so made by these witnesses. Objection was interposed by the District Attorney which objection was sustained by the Trial Court (pp. 290-314). The written notes were not produced and were not examined by the Trial Court.

Questions Involved

1. The Circuit Court of Appeals erred in affirming the Trial Court's ruling in connection with the request made for the production and inspection of the said written notes.

In the instant case the production of the notes was opposed and the Trial Court did not inspect the same (pp. 334-335, 337-338). The inspection and use of said notes was sought for the purpose of contradicting and impeaching these witnesses. These witnesses had made statements refreshed from their own notes as to what Cohen had said to them on December 6, 1943. The production of said notes was objected to by the District Attorney and sustained by the Court. If said notes did not contain contradictory matter why was their production opposed at the trial. Up to the present time, neither your petitioner nor his counsel have any knowledge of what was contained in the said notes so used by the witnesses in this case. If the notes contained contradictory matter the same should have been available to your petitioner for cross-examination and impeachment of the witnesses who made the same. It was shown that the said notes so made by these witnesses related solely to your Petitioner and to no other person or investigation (pp. 314-315). Their testimony having been a recital of what they said was contained in their notes, the notes should have been available to the defense upon the trial to test the credibility of the said witnesses.

2. The Circuit Court of Appeals in examining upon the hearing of this appeal the said written notes which were not part of the record on appeal, committed error.

The error of the Trial Court in refusing the defense counsel's request for inspection and use of the notes was not cured by the examination by the Circuit Court of the notes so allegedly made by these witnesses. The said notes were not contained in the record on appeal to the Circuit Court herein. As a matter of fact, the notes were never in the Trial Court and the Trial Judge did not see the same.

Upon the argument of the appeal in the Circuit Court of Appeals the United States District Attorney handed up the said notes which were not in the record for inspection by that Court. As hereinafter pointed out in our brief we contend that the Circuit Court of Appeals had no right to examine papers not part of the record in that Court and that the examination of the same by the Circuit Court of Appeals did not cure the prejudicial error of the Trial Court made in excluding the use and inspection of the same upon the trial of Petitioner's case.

Reasons for Granting the Writ

Your Petitioner respectfully urges that as shown above and as will be more fully urged in the brief accompanying this petition, the Trial Court and the Circuit Court of Appeals have failed to apply the law relative to the production and inspection of written evidence for the purpose of cross-examining and impeaching a witness.

1. That the ruling made by the Trial Court herein and affirmed by the Circuit Court of Appeals, Second Circuit is in conflict with the decision of the same Circuit Court of Appeals rendered in *United States* v. *Krulewitch*, 2nd Circuit, 145 Fed. (2nd) 76.

2. That the decision of the Circuit Court of Appeals herein with respect to the examination of the said notes in that court is in conflict with the decision of this court in *Edwards* v. *United States*, 312 U. S. 473.

3. That recent decisions rendered in the Circuit Court of Appeals, 2nd Circuit show in the dissents filed therein a conflict as to the rule, applicable with respect to the inspection and use of written statements in testing the credibility of witnesses.

United States v. *Krulewitch*, 145 Fed. (2nd) 76;
United States v. *Jos. Cohen*, 145 Fed. (2nd) 82;
United States v. *Ebeling*, 146 Fed. (2nd) 254.

There should be some clear declaration by this Court as to the proper practice in Federal Courts with respect to the right of inspection and use of written statements in testing the credibility of witnesses in a criminal case. The decision in the *Krulewitch* case (*supra*) recognizes that the Federal practice is unsettled.

Petitioner contends that his rights were prejudiced by the refusal to permit him an inspection and use upon his trial of such written evidence.

The entire case with the above questions and the errors in the record call for the exercise of this Court's power of supervision.

WHEREFORE, your Petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

MURRAY COHEN,
Petitioner.

by THOMAS I. SHERIDAN,
Attorney for Petitioner.